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IN THE

Supreme Court of the United States

No. 491

CORLISS LAMONT, doing business as BASIC PAMPHLETS,

Appellant,

v.

THE POSTMASTER GENERAL OF THE UNITED STATES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT, FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF IN OPPOSITION

LEONARD B. BOUDIN,
VICTOR RABINOWITZ,
30 East 42nd Street,
New York, N. Y. 10017,
Attorneys for Appellant.

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Pursuant to paragraph 3 of Rule 16 of the Revised Rules of this Court, the appellant files this brief in opposition to the appellee's motion that the judgment of the District Court be affirmed.

Statement

The appellee recognizes the substantiality of appellant's constitutional claim on the merits (Motion, p. 7).[1] Appellee's argument is that in certain respects the action is moot and in others not ripe for adjudication.

[1] "Motion" refers to appellee's motion to affirm; "R." to the record filed in this Court; and "Jur. St." to the jurisdictional statement.

Argument

1. Appellant's present receipt of mail is not "the ultimate relief which he demanded" within this Court's intendment in *Taylor* v. *McElroy*, 360 U. S. 709, 711. There, the litigant received all the relief he sought, *viz.*, his access to classified defense information; he did not challenge the Government's basic power to require security clearance.[2] In contrast, appellant has challenged the Government's power to withhold mail or compel listing, his name still appears on eleven lists of the Postmaster General of persons desiring to receive "Communist political propaganda," and such information is likely, as experience shows, to be turned over to congressional committees and thereafter disseminated officially and publicly.[3]

Appellee's reliance upon *Atherton Mills* v. *Johnston*, 259 U. S. 13 is likewise misplaced. That case merely held that a suit instituted by a minor to enjoin the Child Labor Act as unconstitutional became moot when the plaintiff reached his majority.[4]

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[2] In addition, the Solicitor General made certain representations which included the fact "that petitioner stands in precisely the same position as all others who have been granted clearance, that the evidence in petitioner's file will not be used against him in the future, and that the findings against petitioner have been expunged." (*Ibid.*)

[3] In opposing passage of the statute, Senator Joseph S. Clark noted that "clearly a stigma might be attached" to those who request delivery of Communist political propaganda, S. Rep. No. 2120, 87th Cong. 2d Sess. (1962), p. 44 (Individual views). He added that "the information might well find its way to FBI files." (*Ibid.*) The extent of the possible injury is indicated by the printing of an additional 75,000 copies of an earlier congressional committee blacklist, "A Handbook for Americans" (*Methodist Federation* v. *Eastland*, 141 F. Supp. 729 (D. D. C. 1958).

[4] The suit also appeared to be a contrived one, the United States being omitted as a party, 259 U. S. 13, 15; see also *C.I.O.* v. *McAdory*, 325 U. S. 472, 475.

2. The appellee appears to have misunderstood the appellant's reference to the appellee's "deliberate policy" of avoiding a test of constitutionality (Motion, p. 4). Even assuming what is most unlikely, that the institution of a lawsuit was within the contemplation of the statute, this policy of avoidance is additional reason to apply the public interest rule; else the statute, whose constitutionality is concededly in substantial doubt (Motion, p. 7), remains to interfere with the First Amendment rights of citizens.[5] It is over-generous for appellee to say that the statute "embodies a Congressional policy to leave entirely free access for such mail to persons who want it" (Motion, p. 5); rather, the congressional hearings reveal a firm determination to obstruct transmittal of such reading matter, with the only issue being that of method.[6]

3. This is not, as appellee seems to suggest, the case of a litigant himself unaffected who volunteers to assert the rights of others (Motion, p. 5, n. 2). Appellant instituted this lawsuit upon personally suffering a clear justiciable injury not questioned by the court below, and as a necessary result of the same statute's operations, he continues to suffer directly related justiciable injuries (*infra*, p. 5). As District Judge Feinberg stated in his dissent: "• • • if the conclusion as to ripeness with regard to the list is incorrect (as I think it is), then the

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[5] The details of the statute's present enforcement may be found in *Exclusion of Communist Political Propaganda from the U. S. Mails*, Hearings before the Postal Operations Subcommittee of the House Post Office and Civil Service Committee, June 19-20, 1963, pp. 1-64; and in Schwartz, *The Mail Must Not Go Through—Propaganda and Pornography*, 11 U. C. L. A. L. Rev. 805 (July 1964).

[6] See Hearings on *Postal Rate Revision of 1963*, H. R. 7927, 87th Cong. 2d Sess. before the Senate Committee on Post Office and Civil Service (Aug. 21, 1962) pp. 827 *et seq.*, herein called the Senate Hearings; S. Rep. 2120, 87th Cong. 2d Sess. (1962) pp. 21-22; H. Rep. No. 1155, 87th Cong. 1st Sess. (1961) pp. 10-11.

rights of third parties who themselves might be afraid to bring suit are significant" (Jur. St., p. 17a).

Further, this Court has not established an absolute rule against standing to assert the rights of third parties. It has made exceptions to the rule wherever the equities seemed to require it after a full consideration of the problem on the merits. See the cases cited, Jur. St., pp. 12-13.[7] It has said that "[t]he principle [of standing] is not disrespected where constitutional rights of persons who are not immediately before the Court could not be effectively vindicated except through an appropriate representative before the Court," *N.A.A.C.P.* v. *Alabama*, 357 U. S. 449, 459.

The two cases on standing cited by appellee are not apposite to the instant one. In *Tileston* v. *Ullman*, 318 U. S. 44, the plaintiff made no claim of injury to himself. In *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113, 125, this Court held that one without right to challenge the minimum wage provisions of the Public Contracts Act of 1936 could not find standing in the "general public's interest in the administration of the law."

4. The appellee sees no injury in the retention of appellant's name on Post Office lists despite this Court's many recent decisions on state and federal "subversive" lists (Jur. St., p. 7). His suggestion that the stigma flows "from the maintenance of this very action" (Motion, p. 7) overlooks the ameliorating effect of a judicial declaration that

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[7] The rule is qualified by such references as "ordinarily," "a complementary rule of self-restraint" and "its usual rule" in *Barrows* v. *Jackson*, 346 U. S. 249, 255-257. "Justiciability is of course not a legal concept with a fixed content or susceptible of scientific verification." *Poe* v. *Ullman*, 367 U. S. 497, 508, 524. The court below gave greater recognition than does appellee to this fact (Jur. St., p. 14a). See also Mr. Justice Frankfurter's comprehensive discussion in *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123, 149-157 (concurring opinion).

the lists are invalid.[8] On appellee's theory, the very institution of a libel suit would be a ground for its own dismissal or for mitigation of damages since the plaintiff would be spreading the libel.

Appellee apparently recognizes that appellant might be injured by "some future use to which the list may be put" (Motion, p. 7). This, however, appellee treats as "merely hypothetical and not, therefore, ripe for judicial consideration" (Motion, p. 7). But, if the past is prologue, there is surely nothing hypothetical about (i) the danger that the lists will be delivered to other government agencies; (ii) the issuance of congressional committee subpoenas to the listed persons; and (iii) the public dissemination of these and other names in official blacklists in the thousands (Jur. St., p. 8). The danger to appellant is far greater and more immediate than the hypothetical criminal prosecution mentioned in *Cramp* v. *Board of Public Instruction*, 368 U. S. 278.

The instant case is a far cry from the two authorities relied upon by appellee (Motion, p. 7): (1) this Court's refusal to adjudicate the constitutionality of a state law (with whose enforcement the litigant was *not* threatened) until the state courts had acted, *Alabama State Federation of Labor* v. *McAdory*, 325 U. S. 450; and (2) its view that the desuetude of Connecticut's birth control laws nullified any case or controversy, *Poe* v. *Ullman*, 367 U. S. 497; and see Mr. Justice Harlan's dissenting opinion, 367 U. S. 497, 522-539.

5. Appellee seeks in two ways to palliate its attempted immunization from judicial review of a statute affecting First Amendment rights. First, appellee urges that "it is

[8] Also, "[p]ublic attitudes toward a judicial challenge to the program may well be different and less condemnatory than public attitudes toward government disclosure of a list of willing recipients of foreign Communist propaganda", Schwartz, *op. cit.* 843.

the sender, rather than the potential recipient, who would be most seriously affected by any constitutional infirmity of the statute" (Motion, p. 6). This novel argument is directly controverted by this Court's decisions (See, *e.g.*, *Grosjean* v. *American Press Co.*, 297 U. S. 233, 247, 250, and *United States* v. *C. I. O.*, 335 U. S. 106, 144) and by the very argument of the Attorney General in opposing passage of this statute that "[t]he first amendment is intended to preserve the people's right to access to ideas, good or bad."[9] Second, appellee suggests that a suit by a sender could not be mooted; the difficulty is that the very case cited by appellee was dismissed for mootness on still another ground, *McReynolds* v. *Christenberry* (S. D. N. Y., 63 Civ. 2422) *petition for cert. pending*, Oct. Term, 1964, No. 605.

6. The foregoing arguments, it is submitted, show decisively that under the Court's decisions, particularly in the First Amendment area, there is a justiciable controversy between the parties. In any event, this issue is so inextricably woven into the merits of the controversy, including the effect of the various governmental sanctions of detainer, listing and disclosure upon First Amendment rights,[10] that it is more appropriately resolved after full argument upon the merits.

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[9] Deputy Attorney General (now Associate Justice) White in the Senate Hearings, *supra*, note 6, p. 830; see also *Zeitlen* v. *Arnebergh*, 59 Cal. 2d 901, 383 P. 2d 152, *cert. denied sub nom Arnebergh* v. *Zeitlen*, 84 S. Ct. 445.

[10] As Mr. Justice Frankfurter said in *Joint Anti-Fascist Refugee Committee* v. *McGrath*, *supra*, n. 7 at p. 156, "[w]hether 'justiciability' exists, therefore, has most often turned on evaluating both the appropriateness of the issues for decision by courts and the hardship of denying judicial relief." See also the Justice's similar observation in *Poe* v. *Ullman*, 367 U. S. 497, 508-509.

CONCLUSION

The appellee's motion to affirm the judgment of the District Court should be denied.

Respectfully submitted,

LEONARD B. BOUDIN,
VICTOR RABINOWITZ,
30 East 42nd Street,
New York, N. Y. 10017,
Attorneys for Appellant.

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